THE CASE OF JOHN CHANDLER v. THE SECRETARY OF WAR.

It is not a little remarkable that the power exerted by our national judges to declare whether an act of Congress necessarily involved in a litigation before them constitutes a valid rule of action, should have appeared in full vigor very shortly after the organization of government under the constitution. The exercise of such a power, however, exhibits the judicial department of government as testing deliberate measures of a body strictly coördinate with itself, and equally sworn to obey an ordinance allowed to be supreme and controlling, and this apparent check upon the legislature, while long rendered familiar to all by usage, still, at times, seems an unusual feature in our policy, marking it, by general consent, as *sui generis* in the history of constitutional jurisprudence. Whenever, indeed, a national statute arousing widespread interest is declared by the judiciary to be beyond the capacity of Congress to pass, and hence void, there are seldom lacking those who consider such a verdict a manifest interference with popular will as expressed through its legitimate channel—the legislature. That these views are, nevertheless, without adequate foundation, is clearly announced by the judgment in *Marbury v. Madison*,[1] where the doctrine in question is said to be destitute of novelty and necessarily existent under *every* form of government limited by organic law. It will be the aim of the following pages to show that this position was consistently maintained by our national judges from the very beginning; of *development*, in any proper sense of that term, *the records of the court* exhibit no trace.

February 14, 1794, we find the Supreme Court denying a motion made on behalf of one John Chandler, a citizen of Connecticut, for a writ of mandamus intended to compel General Henry Knox, Secretary of War, to place Chandler's name upon the invalid pension list, in conformity with a report filed by the judges of the United States Circuit Court at Hartford, approving Chandler's claim pursuant to jurisdiction vested

1. 1 Cranch 137, 177.

in them by act of Congress passed March 23, 1792. While this action on the part of the court, practically setting aside a plan for the relief of veterans, and one which had been carefully outlined by the national legislature, emphasized in the clearest manner possible both the limited nature of congressional legislative functions and the *rôle* to be assumed by the judicial branch of government in determining, as occasion might arise, when constitutional limitations should become enforceable, the matter does not appear to have caused great surprise or serious opposition; on the contrary, both President Washington and Congress seem to have at once acquiesced, and a new plan for the relief of applicants for pensions was speedily carried into effect in such a manner as to be devoid of the formal objections inducing the court's decision. For such a judicial attitude, indeed, all parties may be said to have been amply prepared, since the judges had already, on more than one occasion, given voice to a determination not to be easily weakened, that the *constitution* should form a sure and ultimate guide in all matters pertaining to their province. In accordance with this view it was that in the autumn of the same year in which the court first met in the city of New York for the hearing of causes (1790), it did not hesitate, in reply to an inquiry from Washington, to criticise sharply, the judiciary act passed by Congress in the previous year—September 24, 1789—saying: "On comparing this act with the constitution, we perceive deviations which in our opinion are important"; and the judges proceeded to add that the circuit system outlined by Congress essentially varied, in their estimation, the constitutional judicial plan, since it was evident that, save in two classes of causes, the constitution had intended the Supreme Court to be a forum of *final* resort only; whereas the legislative scheme, which imposed on the Supreme Court justices original cognizance at circuit in a vast number of cases, went far beyond the theory of those who had framed the new order of government[2]. Again, when, in the summer of 1793, the Genet excitement was at its height, the judges declined to furnish Washington with their opinion touching our obligations under the treaties with France: "They considered themselves," says Marshall[3] "merely as constituting a legal tribunal for the decision of controversies brought before them in legal form;

2. Story, Comm. on the Const. 1579 and Note; McCree's Life of Iredell, 2, 292; and Washington to Thomas Johnson, Spark's Washington, 10, 182.

3. Life of Washington, Vol. 5, page 108; Story, Comm. 1571 and Note.

those gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not going out of the case before them." These conceptions imputed to our earliest judges by Marshall, writing in 1807, were afterwards elaborated by him in the case of *Osborn v. the United States Bank* at February term, 1824.[4]

The feature rendering the pension legislation constitutionally objectionable lay in the fact that Congress had, in effect, so arranged the method of application on the part of the invalids, that the Secretary of War possessed a *revisory* function touching the action of the circuit judges whose findings were to be submitted to the Secretary—he having the power, wherever he should "have cause to suspect imposition or mistake, . . . to withhold the name of an applicant from the pension list, and make report of the same to Congress at their next session."[5] Within a few weeks after the passage of the act the circuit court at Philadelphia flatly declined to entertain jurisdiction of an application made by one Hayburn, and in justification of their action the judges addressed a letter to Washington declaring that since they were bound by oath to support the constitution, and since that instrument intended to vest the national judicial power in *courts*—which bodies are intended to proceed in a *judicial* manner only—they found themselves unable to assume jurisdiction under the act of March 23, 1792, for the reason that a power of revision being therein given to the Secretary and Congress, the judicial department, should it obey the act, would part with the independence unquestionably contemplated in its creation. Similar sentiments were informally transmitted to Washington by the circuit judges sitting at New York, and at Newbern, N. C., and these various communications were laid before Congress by the President,[6] with the result that Congress afterward modified the plan as we have already noted. Some of the justices, however, agreed that while they could not take *judicial* action in the matter of pension claims, they might nevertheless proceed as *commissioners*, though it is plain that the position assigned to the Secretary of War was far from agreeable to any court: "We had two jury cases at

4. 9 Wheaton 738, 819; the letter of Jefferson, Sec'y of State, to the Judges, and their replies in July and August, 1793, are given in Vol. 3 of Jay's Letters, page 486.

5. 1 U. S. Stat. at large 244.

6. Messages and Papers of the Presidents, Vol. 1, pages 123, 133, 2 Dallas, page 410, Note.

Trenton," wrote Cushing to Jay, October 23, 1792, "and there we took up the matter of invalids—there being no determination upon the subject in that district before, the judges not having the statutes there last term. Mr. Morris was strong in favor and I was not opposing; so we acted as commissioners and sent our certificates accordingly (without making any entry in the book about it) to the *Supreme* Secretary of War."[7]

In the preceding month, Iredell found himself holding the circuit court for Connecticut at Hartford, and here it was that Chandler applied to him and to the local district judge—Law—to be put on the invalid pension list: "We have had a great deal of business to do here," wrote he, "particularly as I have reconciled myself to the propriety of doing invalid business out of court. Judge Wilson altogether declines to."[8] The claim of Chandler was approved by Iredell and Law but failed to gain allowance at the hands of General Knox. Meantime, February 28, 1793, a fresh act was passed by Congress providing that only the *evidence* in pension applications should be taken before the judges who are directed by the act to "transmit a list of such claims, accompanied by the evidence herein directed, to the Secretary of the Department of War in order that the same may be compared with the muster rolls and other documents in his office; and the said Secretary shall make a statement of the cases of the said claimants to Congress with such circumstances and remarks as may be necessary in order to enable them to take such order therein as they may judge proper—no person not on the pension list before March 23, 1792, shall be entitled to a pension who shall not have complied with the rules and regulations herein prescribed, saving, however, to all persons all and singular their rights founded upon legal adjudications under the act . . . it shall be the duty of the Secretary at War in conjunction with the Attorney General to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights claimed under the act aforesaid by the determination of certain persons styling themselves commissioners."[9] In pursuance of this last-named requirement, the Attorney General attempted at the following August term of court to settle the question of validity by a motion for a *mandamus* directed to the Secretary to compel him to place on

7. Correspondence and Public Papers of John Jay, 3, 449-450.
8. Iredell to his wife, September 30, 1792; McCree's Iredell, 2, 361.
9. 1 U. S. Stat. at large, page 324.

the pension list such names, approved by the judges at circuit, as the Secretary had disallowed. But this general method being deemed too vague by the judges, nothing was accomplished. Six months later—February 5, 1794—Chandler's case, accordingly, was brought before the Supreme Court on its individual merits. A complete account of the proceedings is given by Mr. S. W. Dana, a prominent member of the Connecticut bar of that day and a graduate of Yale College, in his remarkable speech in opposition to the repeal of the Judiciary Act of 1801, delivered in the House of Representatives, March 1, 1802.[10] "I have," said Mr. Dana, "an extract from the minutes of the Supreme Court certified by the clerk of the court:

"Wednesday, February 5th, 1794. Present: The honorable John Jay, Chief Justice; William Cushing, James Wilson, John Blair, and William Paterson, Associate Justices.

"Mr. Edmond, of counsel for John Chandler, a citizen of the State of Connecticut, this day moved for a *mandamus* to the Secretary of War for the purpose of directing him to cause the said John Chandler to be put on the pension list of the United States as an invalid pensioner conformably to the order and adjudication of the Hon. James Iredell and Richard Law, Esq'rs, judges of the circuit court of the United States.

"The court informed Mr. Edmond that when the trial of the cause now before the court should be finished they would hear him in support of his motion.

"Friday, February 7, 1794, the court proceeded to hear Mr. Edmond on the subject of his motion made on the 5th inst., and agreed to hold the same under advisement.

"Thursday, February 13, 1794, the court proceeded to hear the argument of counsel on the motion of Mr. Edmond for a *mandamus* to the Secretary of War, made on Wednesday the 5th inst.

"Friday, February 14th, 1794, the court having taken into consideration the motion of Mr. Edmond, of the 5th inst. and having considered the two acts of Congress relating to the same, are of opinion that a *mandamus* cannot issue to the Secretary of War for the purpose expressed in said motion."

The judiciary act of 1801, following that of 1789, contained a clause conferring upon the Supreme Court power to issue the writ of *mandamus* in cases warranted by the principles and usages of law. This clause had been attacked on February 17, 1802, by Mr. Thomas T. Davis of Kentucky, who declared: "But it is said the law of last session is admitted to be constitutional and that we have no power to repeal it. Look

10. Annals 7th Congress, 1st Session, pages 903–904.

at the second section of this law,[11] and compare it with the constitution, and no candid man will declare it constitutional. The original jurisdiction given by that section to the judges of the Supreme Court exceeds those intended by the constitution." "Here," adds the reporter, "Mr. Davis read the law and constitution."[12] The point thus raised was, of course, precisely that involved in the celebrated application of William Marbury, then pending before the Supreme Court, for a *mandamus* to compel the delivery to him by Secretary Madison, of the commission which had been signed by President Adams and sealed by Chief Justice Marshall as acting Secretary of State, appointing Marbury a justice of the peace for Washington County in the District of Columbia, and which commission had been by order of President Jefferson, who took office the day succeeding that on which the commission was sealed, retained in the Secretary's office. Mr. Dana, an advocate of the rightfulness of Marbury's application, has left us a contemporary account of the whole case, and it was in connection with this that he instanced the Chandler decision for the purpose of showing that a writ of *mandamus* might properly issue from the Supreme Court to a high officer of government, and might have issued in Chandler's case but for the unconstitutionality of the act of 1792, there having evidently been no question made on Mr. Edmond's motion touching the point upon which Marbury's case was afterward made to turn by the Supreme Court and which had been so clearly announced by Mr. Davis, viz., that the court lacked the power under the constitution to issue the writ in the exercise of its *original* jurisdiction—such jurisdiction being confined by the constitution to cases where a state of the union or the representatives of a foreign government may be parties. This feature, however, was not overlooked by Mr. Dana who, like Ex-Attorney General Lee, in his argument before the court on behalf of Marbury, took the ground that *mandamus*, in such a case, is an *appellate* proceeding. The judges, as we know, when delivering their opinion in Marbury's case, February 24, 1803, affirmed, however, that *mandamus* to a government officer must be considered as *original* in character and therefore beyond the court's competence on constitutional grounds. Thus it was that Chief Justice Marshall, when delivering the opinion of the court, expressly alluded to the Chandler application for a *mandamus* to the

11. Which section contained the clause touching *mandamus*.

12. Annals, l. c.

Secretary of War, for the purpose of showing, precisely as Mr. Dana did the previous year, that *mandamus* offered an appropriate remedy for the case at bar, though as the Chief Justice afterwards showed, the court lacked the power to issue the writ. It should be remembered, too, that Justices Paterson and Cushing, who had sat in the Chandler case, were also members of the court which unanimously decided against Marbury's application. In both instances the applications were dismissed for lack of jurisdiction—on the part of the *circuit* court, in the earlier case, under an act of Congress unconstitutional because conferring power not judicial, and in the later case because an act of Congress which conferred upon the Supreme Court itself power to entertain such an application as the one at bar, widened the original cognizance of the court in a manner at variance with the constitution and, therefore, void. Referring to Chandler's case, Chief-Justice Marshall said:[13] "When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of the department directing him to perform an act enjoined by law in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the commisssioners did not confer on the applicant a legal right. The judgment in that case is understood to have decided the merits of all claims of that description; and the persons, on the report of the commisssioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list." Here the court, two members of which, as we have noted, had sat in the Chandler case, expressly declares that in 1794 it had dismissed Edmond's motion for *mandamus* by reason of the *unconstitutionality* of the act upon which it was founded. This, then, is certainly the *first* case in which the Supreme Court took the attitude in question; as such it should claim a preëminent place in our legal annals, although it has lain practically neglected by writers on constitutional subjects; Coxe, indeed, in his comprehensive work,[14] doubts whether the case as mentioned by Chief-Justice Marshall really existed.

The principle upon which the Pennsylvania Circuit Court denied Hayburn's application and the Supreme Court afterwards dismissed that of Chandler viz., that the act of Congress

13. 1 Cranch 172.

14. An Essay on Judicial Power and Unconstitutional Legislation, pp. 16, 17.

called upon the judges to exercise a power not judicially enforceable, has been illustrated in many cases of later date, a recent one being that of the *District of Columbia v. Eslin*, decided November 3, 1901.[15]

Three days after the determination made in Chandler's case, the well-known suit of the *United States v. Yale Todd* was decided in favor of the government. This suit, the details of which are given by Mr. Dana in the address already alluded to and which are also preserved in the familiar note appended to Ferreira's case, was brought in pursuance of the provisions of the act of February 28, 1793, above cited, in order to test the validity of decisions made by the judges as commissioners, and one Yale Todd, who had received at the New Haven circuit an allowance of pension money through the favorable report of the judges confirmed by the Secretary of War, was selected as a defendant in order to settle the entire matter. Judgment passing for the United States was equivalent, as remarked in the note to Ferreira's case, to a declaration,—if taken in connection with the prior determinations and informal opinions at circuit,—that the pension legislation as first outlined by Congress was unconstitutional and void, although as the note states, the question touching the court's capacity to entertain the suit itself as an original proceeding was not considered. This case, then, forms the *second* instance in which the court decided against the validity of an act of the national legislature: "We here find," said Mr. Dana,[16] "that the authority of the judges to decide questions arising under the constitution was fully recognized. The first President of the United States, the Congress, and the judges of the Supreme Court, all sanctioned the opinion by their official proceedings, and it is well known that many of them were members of the general convention or of state conventions which agreed to the constitution . . . the principle, therefore, which is now disputed, has been settled for years. It is the established principle of the constitution."[17]

A few days earlier—February 20, 1802—Mr. Bayard of Delaware had discussed the same doctrine at length, and had pointed out, as did the judges afterwards in Marbury's case, that the principle in question is plainly recognized in the constitution itself, which instrument—article 3, section 2—"expressly

15. 183 U. S. 62, 66.

16. *Loc. cit.*

17. Annals 7th Congress, 1st Session, pages 725, 726.

extends the judicial power to all the cases arising under the constitution, the laws, etc. The provision in the second clause of the 6th article leaves nothing to doubt: 'This constitution, and the laws of the United States, which shall be made in pursuance thereof, etc., shall be the supreme law of the land.' The constitution is absolutely the supreme law. Not so the acts of the legislature. Such only are the law of the land as are made in pursuance of the constitution." Here Mr. Bayard read section 25 of the Judiciary Act of 1729, providing that a final judgment in a state court where the validity of a treaty or statute of the union is drawn in question, "may be reëxamined in the Supreme Court of the United States upon writ of error." "Thus, as early as the year 1789," continued Mr. Bayard, "among the first acts of the government, the legislature explicitly recognized the right of a state court to declare a treaty, a statute, or authority exercised under the United States, void, subject to the revision of the Supreme Court of the United States; and it has expressly given the final power to the Supreme Court to affirm a judgment which is against the validity either of a treaty, statute or an authority of the government. I humbly trust, Mr. Chairman, that I have given abundant proofs from the nature of our government, from the language of the constitution, and from legislative acknowledgment, that the judges of our courts have the power to judge and determine upon the constitutionality of our laws." Mr. Bayard also, during the same address, used the striking illustration, afterwards employed in nearly the same words by Chief Justice Marshall, when writing the opinion in Marbury's case, that since Congress is expressly prohibited by the constitution from doing certain things; as, for example, it may not pass a bill of attainder, *ex post facto* law, etc.:—now, if, in point of fact, the legislature actually passes such a law, and one is condemned under it, what decision shall a court render having before it the constitution and the law of a coördinate branch of government: "the courts are bound to decide that they have only the alternative of pronouncing the law or the constitution invalid. It is left to them only to say that the law vacates the constitution, or the constitution avoids the law." A similar illustration had been employed with striking effect by Nelson and Tucker, JJ., in the notable case of *Kamper v. Hawkins*, determined by the General Court of Virginia November 16, 1793, it being the latter judge who then announced "that the constitution is a rule to all the departments of the government, to the judiciary, as well as to the legislature."

Bearing in mind the determinations made in 1794, we are not surprised to find Mr. Justice Paterson at April term, 1795, when delivering his charge to the jury in the celebrated Wyoming case of *Vanhorne's Lessee v. Dorrance* in the Circuit Court of the United States at Philadelphia, maintaining with great firmness the doctrine of judicial power to pass upon an act of a *state* legislature necessarily brought before the court in a cause at bar. In neither the Chandler nor Todd cases was there any formal opinion filed; in the former, we have fortunately, in addition to the brief announcement of the decision, a suggestion of the basis upon which it was made—namely, the statute of Congress as incompetent to sustain the rights claimed under it; whence it follows that its operation was considered at variance with constitutional principles. But in the Wyoming case, Paterson elaborates at considerable length the underlying reasons which must support every such determination; the constitution—strictly organic—is paramount, as being the work of the people in its sovereign and wholly unlimited capacity, whereas legislation springs from a derivative and hence subordinate will—that of the state government *created* by basic law; acts of this latter body, if repugnant to the higher regulation, must, therefore, be void; this is shown by the fact that in all constitutions there are certain reservations — in that of Pennsylvania, freedom of worship freedom of elections, trial by jury, etc.; where a legislature endeavors to violate such 'fundamental provisions, "it will be the duty of the court to adhere to the constitution and to declare the act null and void"; moreover, judges are *sworn* to support the constitution, and it thus becomes a *rule* by which they, as well as the legislature, are to be governed; hence the constitution "contains the permanent will of the people, and is the supreme law of the land."[18] The same principles were taken up in 1798 by Iredell, J., in *Calder v. Bull*,[19] and applied to the *national* constitution. When Chief-Justice Marshall came to write the opinion in Marbury's case, he did, indeed, little more, when treating the constitutional aspects of the matter, than sum up these positions of Paterson and Iredell. It should be carefully noted, however, that Paterson himself had merely condensed, though in most brilliant fashion, the remarkable demonstration outlined by the judges of the Virginia general court when delivering their opinions *seriatim* in the

18. 2 Dallas 304, 308.

19. 3 Dallas 386, 399.

great case of *Kamper v. Hawkins* in November, 1793.[20] The Virginia judges, moreover, had already exhibited precisely the same firm attitude touching their duty in questions between statute and constitution, destined to more notable illustration a little later on the part of the national judiciary; the Virginia court had not hesitated in 1788 to arraign the state legislature for its circuit court plan,[21] and although the law makers had yielded at the time and modified the judiciary system, nevertheless, a fresh transgression of constitutional principles, by endeavoring to unite common law and equity powers in a single tribunal, served to bring on the declarations in *Kamper v. Hawkins* which served as a never-failing fountain of judicial inspiration to after years.

The demonstration given by Mr. Justice Paterson showing the logically necessary nature of judicial duty where there appeared a legislative impairment of a distinct reservation in a constitution, formed the foundation of two notable decisions very early in the history of our state independence, and in both of these cases legislative acts abridging trial by jury were held powerless, in New Jersey and Rhode Island to confer jurisdiction, and were thus, judicially, set aside. In each case we are strongly reminded of the *charter* origin of American constitutions: the New Jersey case[22] turned upon a reservation of trial by jury in the instrument drafted by the provincial congress at Burlington July 2, 1776—Paterson being secretary of the convention—and which instrument declares that "we, the representatives of the Colony of New Jersey, . . . have . . . agreed upon a set of charter rights and the form of a constitution. That the common law of England as well as so much of the statute law as has heretofore practiced in this colony, shall still remain in force until they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." In the Rhode Island case—*Trevett v.*

20. Brockenbrough & Holmes, Virginia Cases, 1, 20, *seq.*

21. Case of the Judges, 4 Call, 1, 135; summarized by Randolph, February 20, 1802; Ann. of 7th Cong., 1st Sess., page 655.

22. *Holmes v. Walton*, noticed by Mr. Chief Justice Kirkpatrick in his opinion in *State v. Parkhurst*, May term 1804, 4 Halsted, N. J. Law 443, 444; the case is considered in detail by Dr. Austin Scott in the American Historical Review for April, 1899, page 456, *seq.*

Weeden[23]—a statute disregarded by the judges withdrew trial by jury altogether, and thus became contradictory, as it was held, to the Royal Charter of 1663, which permitted legislation on the part of the colonists not repugnant to the *law of England:* now trial by jury may well be thought a part of that law. At the Revolution, Rhode Island, like Connecticut, was content with the adoption of its ancient charter as the new state fundamental law; and while neither in New Jersey, Rhode Island nor Conecticut were the revolutionary constitutions ratified by the people at large, they, nevertheless, through acquiescence on the people's part, must be considered as having formed true fundamental written constitutions in the fullest acceptation of that term.[24] The North Carolina instances of similar import are reviewed by Ruffin, C. J., in *Hoke v. Henderson*, 4 Devereux I, 15, 16; the Chief-Justice here cites the important one—anonymous—of the *State v.* ——[25], a case which has been quite neglected by our constitutional writers but which contains, nevertheless, an invaluable exposition of constitutional principles.

Passing by other determinations, we need only notice here the significant utterance of Chief Justice Marshall, a few weeks only prior to *Marbury v. Madison*, in which, sitting at the North Carolina circuit, he clearly announced the necessary limitations of state legislative power and the authority of the judges in constitutional questions.[26]

In his notable charge in *Vanhorne's Lessee v. Dorrance*, Mr. Justice Paterson took occasion to carefully distinguish the power of *Parliament* as a legislature possessing truly sovereign capacity; if the *intent* of this assembly be once judicially ascertained, its *will*, thus made known, cannot be disputed, but must be obeyed;[27] "in America," continues the learned justice,

23. Story, Comm. 488; Annals of Congress, February 24, 1802, page 727; Trial of R. I. Judges, by J. Winslow, N. Y. 1887; and many recent collections of cases.

24. *State v. Parkhurst, supra; Starr v. Pease*, 8 Conn. 541, 547; Conn. Public Records, Vol. 1, page 31, where the adoption of the charter on October 10, 1776, as the new State constitution, is recounted.

25. 1 Haywood 29, determined in 1794.

26. *Ogden v. Witherspoon*, 2 Haywood 227.

27. 2 Dallas 307; cf. *Blacks. Comm.* 91. On the other hand, the contention in Coke's report of Dr. Bookham's case, and in Hobart's report of *Day v. Savage*, (8 Rep. 118 a; Hob. 87) touching judicial duty to decline recognition of a statute at clear variance with natural justice, goes no farther than to announce that judges will not impute to the legislature such a purpose; such was the ground of decision by the Mayor's Court of New York in 1784, in *Rutgers v. Waddington*. Cf. also Beasly, C. J., in *Schroder v. Ehlers*, 2 Vroom (31 N. J. L.) 44, 49; 1 *Kent. Comm.* 448, *seq.*

"the case is widely different: every state in the Union has its constitution reduced to written exactitude and precision. . . . Whatever may be the case in other countries, yet, in this, there can be no doubt that every act of the legislature, repugnant to the constitution, is absolutely void."

In Great Britain, however, the legislature derives its authority from no express grant of the nation conferring a measured capacity, but, on the contrary, Crown, Lords and Commons — in Parliament — *directly* represent the constitutional force of the kingdom, and are thus without legal restraint; their power finds a parallel in the state conventions, in the United States, called to vote on changes in the national constitution. "It is not to be doubted," said Lord Holt in 1704, in his celebrated pronouncement in *Ashby v. White*, "that the commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them."[28] "And to be short," says Sir Thomas Smith, Regius Professor of Civil Law at Cambridge, in the days of Henry the Eighth,[29] "all that ever the people of Rome might doe, either *Centuriatis Comitiis* or *Tributis*, the same may be done by the Parliament of England; which representeth, and hath the power of the whole realm, both the head and bodie. For every Englishman is intended to be present, either in person or by procuration and atturny, of what preheminence, state, dignitie or qualitie soever hee be, from the Prince (be he King or Queene) to the lowest person of England. And the consent of the Parliament is taken to be every man's consent."

There is here, manifestly, no scope for a judicial testing of legislation by terms of any organic pattern; but in the case of a chartered government authorized by *sovereignty*, the matter stands far otherwise. Every act of the derivative and limited organization may, plainly, be tried by the rule which limits it; the office of the *judge*, too, now becomes indispensable should a contest arise between legislation enacted by the law-

28. 2 Ld. Raymond 938; cf. Hardwicke C. J., to the same effect in *Middleton v. Crofts*, in 1736; 2 Atkins, Appendix, 650–654.

29. *De Republica Anglorum*, Chap. XXIV.

makers whose power springs from the charter, and the fundamental restrictions laid down on the part of the sovereign, and the judicial faculty to be evoked precisely answers to Pufendorf's definition: *potestas judiciaria, cujus est lites civium cognoscere et decidere singulorumque facta, quae legibus contraria arguuntur, ac poenam legibus convenientem dictitare.*[30] It is, accordingly, where the *by-laws* of a chartered town is challenged for nonconformity to the royal or parliamentary act erecting it, that judges properly appear as final interpreters of constitutional provisions: "but sure we may determine on a charter granted by the King," said Lord Holt, in *Ashby v. White*;" and in a later case the judges say: "neither can a by-law explain a charter, for that must be done by the judges."[31]

At Rome, though the assembly, as Sir Thomas Smith well says, is the constitutional master, a like principle, touching *subordinate* legislation, is easily discerned. The people's will, indeed, expressed in a *lex*, is subject in earlier days to a species of *formal* control, by the patrician section of the senate, through the *patrum auctoritas*—and later to a trial before the *augurs*, at the senate's instigation, where a *vitium* is alleged—nevertheless there is here no *over-law* to which appeal may be made. In revolutionary days, likewise, the *senate* claims—though quite without *legal* foundation — a dispensing power; hence Cicero is made to say in the apochryphal *de domo:* "*senatus quidem, cujus est gravissimum judicium de jure legum.*"[32] But in the Roman *provincial* system there clearly existed a genuine charter law illustrating in striking fashion the doctrines under examination. The *lex provinciae*, promulgated by a commanding general at the

30. *De Jure Naturae et Gentium*, VII, IV, 4.

31. *Rex v. the Mayor of Weymouth*, 7 Modern 373; affirmed on appeal to the Lords, December 1, 1742, Brown's cases in Parl., 2, 304.

32. Cicero *de domo* 27, 71. The *patrum auctoritas* is summarized by Schiller—*Römische Altertümer*—in Müller's *Handbuch*, Vol. 4, pt. 2, pages 128, 131, etc.; and in Smith's *Dictionary of Greek aud Roman Antiquities*, 1, 247-256. In the *de domo* Cicero is speaking of the senate's " opinion touching the *validity* of statutes;" this phrase is misapprehended by Coxe—*Judic. Power and Unconst. Legis.*, page 110—who renders *de jure legum*: "concerning the law of laws." Senatorial interference with measures of the *comitia* is considered in much detail by Mommsen—*Römisches Staatsrecht*, 3, 363, *seq;* he says of the senate's assumption to exercise a revisory function in legislation: *allerdings gehören alle diese Vorgänge der Revolutionsepoche an; der wilden Gesetzmacherei derselben wird durch eine nicht minder wüste Cassationsprocedur gesteuert.* Flaminius, indeed, in 218 B. C. flatly defied both augurs and senate when a *vitium* in his election as consul was announced.

reduction of a province, together with local charters or special enactments for the administration of districts and towns, offer familiar examples; as do also the charters of so-called "free" cities self-governed, in subjection, however, to an explicit law graven upon a tablet set up in Rome and in the *civitas federata* itself. Of this latter description was the charter of Termessus in Pisidia, whose citizens might pass such by-laws as they pleased "*quod advorsus hanc legem non fiat*";[33] notable instances of provincial regulations are those promulgated in 167 B.C. by Anicius at Scodra, dividing Illyria; and by Aemilius Paulus at Amphipolis, for Macedonia. Livy carefully distinguishes the provincial constitution—*formula*—from the *lex*, intended to be of local application and based on the documents—*literae*—of individual communities: Liv. 45, 26, 15; 29, 1; 30, 8; 31, 1; Pliny has left us, in his correspondence with Trajan, a vivid picture of frequent appeals to the emperor for judicial construction of privileges claimed by these limited governments.[34] At Athens, we may notice, the *people* is equally supreme, though *legislation*—*νομοθεσία*—comes into existence not through the assembly but by means of committees appointed *ad hoc* from the jurymen sworn for a current year, and whose functions, though leaning toward judicial procedure, were, in essence, *deliberative*. The annual revision of the code from the standpoint of *expediency* at the first assembly—July-August—and the formal scrutiny on the part of law-officers—*θεσμοθέται*—whose action was known as the *straightening* of the laws—*διόρθωσις τῶν νόμων*—were equally intended to preserve harmony in existent regulations, while the celebrated process for a trial upon the ground of defect in *form*, to which a law or temporary decree—*ψήφισμα*—might be subjected—*Παρανόμων γραφή*—exhibits, not a test by any standard imposed by a power *above* the legislators who had framed the act, but merely the *people* in another capacity determining whether its own deed measured up to a standard set and also changeable by itself: *θεσμοθέτης*, *ἡλιαστής* and *ἐκκλησιαστής* alike represented sovereignty, and the parallels

33. Bruns, *Fontes Jur. Rom. Ant.* (ed. 1893), 1, 94.

34. Marquardt, *Römische Staatsverwaltung* 1, 65, *seq.*, has brought together all the references touching this interesting subject; in Vespasian's time, it appears, there were some three thousand of these law-tablets extant at Rome in the temple of Jupiter Capitolinus. From the severe prohibitions of the *lex coloniae Genetivae* (Bruns, 123, 130,) it is plain that a proconsul's duty, were a local act contravening the charter of foundation brought before him at the assizes—*conventus*—would be to pronounce it void.

occasionally drawn between Athenian and American systems fail in completeness, though, again, as at Rome, the *colonial régime* offers suggestive analogies.[35]

That the British municipal corporation with its charter and by-laws was, constitutionally, reproduced on the west of the Atlantic, became plain, however, at an early day, and a glance at the remarkable development, during the eighteenth century, of a distinct jurisprudence of by-laws in the court of King's Bench will show the fundamental principles touching the necessary relation of original and derivative legislative action carefully elaborated. These doctrines, long familiar to the common law, find their earliest leading expression in colonial jurisprudence[36] in the celebrated appeal of Winthrop from a judgment of the Connecticut Superior Court; the cause was determined by the Crown in Council February 15, 1728, upon a report from a judicial committee comprising the two Lord Chief Justices, the Lord Chancellor, the Master of the Rolls, and many other notabilities. An act of the Connecticut Assembly had attempted to vary the ancient common law rule touching descent of real estate to the eldest son, and from its operation in his own case Winthrop, in the phrase of the day, "appealed home," and won his cause. The language of the judgment is most suggestive: the act of assembly is "laid before ther lordships" and, on comparison with the terms of the Connecticut charter which forbade local legislation not in conformity with the law of England, the act is held "not warranted by the charter of that colony" and hence is adjudged "null and void." This language we recognize as made familiar in many an American constitutional decision since the days of *Marbury v. Madison*, where the act of Congress was held by the judges "not warranted by the constitution" and hence "null and void."

35. The somewhat complicated machinery of legislation through sworn committees is the device of the fourth century B. C.; earlier, the assembly directly confirms a plan sketched by a committee of one, perhaps, or, at least of a small number of chosen statesmen—the subject is best condensed in Herman's *Staatsaltertümer* (6th ed.) 91. An outline of Greek legislative theory in its constitutional aspects would prove a useful addition to our comparative constitutional literature.

36. In an article published in the *Harvard Law Review* for May, 1905, and after the above lines were written, Mr. Chauncey G. Parker has called attention to the case of *Basse v. Bellomont*, tried before Lord Holt and a jury in 1700 and exhibiting "the first discussion in a court of law of the constitutionality of a colonial statute."

Pitkin, writing in 1828,[37] gives an account of early appeals to the council and instances Winthrop's case: "Theseappeals," says he, "brought into question, in England, the validity of some of the laws in the charter colonies. This was particularly the case in an appeal from the settlement of an estate in Connecticut in 1727, in which the king and council decided that the law of descents in that colony, which gave the female as well as the male heirs, a part of the real estate, was null and void, because *repugnant to the laws of England*, and therefore not warranted by their charter.

"The law officers of the crown, in this case, insisted before the council, that the powers of the corporation of Connecticut, were limited merely to making by-laws for settling the forms and ceremonies of government and magistracy, and for naming and stating officers, and for distinguishing the several duties of such officers, forms of oaths, etc., a power, they said, given to every little corporation in England, but could never be construed to extend to the making laws for *dividing property* and the *descent of real estate.*"

Here the act of the colonial assembly is assigned to its true place in the constitutional scale—that of a by-law;[38] it is the act of legislators whose power is *limited* and the extent of which limitation is to be judicially determined whenever a case involving the exercise of legislation under the charter comes before a court. While the decision on Winthrop's appeal was reversed by the Lords of the Council in 1745, it seems probable that this arose from the consideration, strongly urged in argument in the case of *Phillips v. Savage* in 1737—a controversy brought up on appeal from a Massachusetts decision—that even in England primogeniture cannot be held to be the unvarying rule since the customs of gavelkind, borough-English, etc.,

37. *History of the United States*, 1, 123, *seq.*

38. In the federal convention, June 29, 1787, Madison declared that, as the confederation then stood, state acts of assembly "in relation to the paramount law of the Confederacy, were analogous to that of by-laws to the supreme law within a state." Despite, however, the fact that, constitutionally, these acts were but by-laws, it will be well recollected that it was the practical impossibility of controlling, through the articles of confederation, the defiance by states of our treaty obligations with Great Britain that led to the insertion in the new constitution of the clause proclaiming treaties a part of the supreme law; cf. Iredell J. in *Ware v. Hylton*, 3 Dallas, at pages 276-277. In his Law of the Constitution, Prof. Dicey (4th ed. page 141) compares an act of Congress to the by-law of an English private corporation; this resemblance was noticed by Williams, C. J. in *Pratt v. Allen*, 13 Conn. 119, 125, June, 1839, citing 3 Tenn. R. 198.

greatly modify it in certain localities; hence colonial policy might be allowed similar deviations without conflicting with the charter requirement of conformity to the common law.[39]

The growth at Westminster Hall of a distinct body of rules touching the limits of self-legislation in a town government organized by charter, received an extraordinary impetus at the very time when Winthrop's case was judicially determined, through the increase of what came to be known as "select bodies" within the borough corporation itself. The struggle for the control of parliamentary representation became, necessarily, much simplified in many localities in case it were posible to so narrow the governing body of boroughs possessing the franchise that voting for members of Parliament should be restricted to a very small and practically self-perpetuating order; this end was sought to be accomplished on the part of borough legislators, through by-laws disqualifying from eligibility to local office the greater portion of the borough freemen, notwithstanding a chartered right possessed by these latter of election if nominated by their corporate brethren. It was in the many contests touching the validity of such by-laws that the rules of which we have spoken became a settled feature of common law doctrine; and in the process the familiar terms afterward destined to characterize American public law, received their first development: for *charter* we have, under Lord Mansfield, *constitution;* the Common Council is declared incompetent to pass a by-law inconsistent with the constitution; and such a by-law, if found violating the constitution, is judicially pronounced "null and void." In the cele-

39. The papers in Winthrop's appeal are preserved in Vol. 4 of the 6th series of the Mass. Hist. Society's Collections; at page 511 the later cases are referred to; that of *Phillips v. Savage* appears in the proceedings of the Society for October, 1860, page 79. Our constitutional indebtedness to the colonial charter and the English trading company have been set forth on many occasions: cf. Mr. Brooks Adams "The Embryo of a Commonwealth," in the *Atlantic Monthly* for November, 1884; Mr. James Harvey Robinson, "The Original and Derived Features of the Constitution," in Annals of the Am. Acad. for Oct., 1890, and "The Genesis of a Written Constitution," Ann. for April, 1891. Many early cases are collected and commented upon in a note to Quincy's Reports published at Boston in 1865; more complete is the article by Mr. Meigs, of Philadelphia, in the *Am. Law Rev.*, April, 1885; also an article in the same publication, Sept., 1895, by Mr. R. L. Fowler, "Origin of the Supreme Judicial Power in the Fed. Const.;" and articles by the late Prof. Thayer, and by Mr. H. L. Carson and Mr. C. B. Elliott in the Am. Law Reg., the *Pol. Sci. Quarterly*, and *Harvard Law Review*.

brated charter cause of *Rex v. Durham*,[40] Ambler argues that the by-laws must *pursue* the local *constitution*, just as our own judges in Marbury's case drew attention to this requirement touching an act of Congress which must be made "in pursuance of the constitution." So the reasoning from the *prohibitions* of a constitution—which forms so distinctive a feature in *Kamper v. Hawkins*, *Vanhorne's Lessee v. Dorrance*, and *Marbury v. Madison*—is employed with great force by Lord Mansfield in *Rex v. Cowle*, at Trinity Term, 1759,[41] where the question at issue was the power of the court under the Berwick charters to bring up by *certiorari* a local indictment for assault; could the corporation hold itself not amenable to the court's jurisdiction, said Lord Mansfield, it would present the case of a *limited* government clothed with power knowing no bounds. In the leading cases of *Rex v. Spencer* and *Rex v. Cutbush*,[42] prior determinations are collected and the principles we have noted are elaborated; in the cases on appeal to the House of Lords, preserved in Brown's Reports of Cases in Parliament (Vol. II), there are shown in detail some celebrated determinations which strikingly remind us of American constitutional decisions. Indeed the solicitude so persistently manifested by the earliest New England colonists touching their charter rights, is easily seen to be a direct inheritance from over sea taking its first rise in English municipal life. Nor are we surprised to find the General Assembly of Rhode Island and Providence Plantations, on receipt of its royal charter, making an order "that the Recorder be desired to attend this Court, and to carry and recarry the Charter of this Court for the peruseall, while this Assembly see cause."[43] In like manner the spirit of Connecticut, and its determination that its laws should be *constitutional*, is reflected in an order of the General Court at Hartford, October 9, 1662: "This Court doth order and hereby declare all ye Lawes and orders of this Colony to stand in full

40. Preserved in Kenyon's Notes of Cases. The term constitution appears ordinarily in English law reports in its *concrete* sense as the equivalent of ordinance or by-law, and is so employed in the Georgia charter of 1732. In 1684, however, it is used by the Privy Council, when criticising New York's proposed charter, as signifying the charter itself, and with the precise force familiar to our own terminology; cf. *Docs. Rel. to the Col. Hist. of the St. of N. Y.*, Vol. 3, 358.

41. Burrow, 834, 836.

42. Burrow, 1828, 2204, *seq.*

43. Records of the Colony of Rhode Island and Providence Plantations, Vol. 2, page 24.

force and virtue unless any be cross to ye Tenour of our Charter."[44] At the time of the Revolution, so firmly fixed, despite much local objection, had the practice of "appealing home" become, that the people of Delaware, in framing their first constitution, expressly declared that their highest tribunal should possess the jurisdiction formerly exercised "by the King in Council under the old government."[45]

Nor was Great Britain the sole theater upon which the principle of local limited government, afterward destined to be expanded on a vast scale in the United States in state and national administrations, reached their earliest development through judicial decision. In France the medieval charter, evidencing the establishment of *order*, and hence known by the suggestive title of *institutio pacis, règles de constitution, lettres de fondation*,—the town itself being termed *ville de loi; villa se regente per legem*,—while not a veritable constitution, but rather the germ only of law organic, must, nevertheless, be vindicated through judicial construction either on the part of the local magistrates—*Échevins*—of the locality from whose original grant similar later charters have been patterned, or, in the last resort before the royal judges—the *Parlement de Paris;* on occasion, the King himself will hear the cause: in all such cases charters are produced and by their side are laid the acts of local legislation complained of; comparison is made and judgment passes. When construing a charter the function of the Parliament is strictly *judicial* and to be carefully distinguished from the *rôle* afterward assumed by the *mâitres* of criticising legislation of the *kingdom*. Here, of course, their power constitutionally failed. In determining charter contests they enforce, as do judges in the United States, the mandates of *sovereignty* witnessed in a rule of action intended to be controlling; but in attempting to pass, by reason of their duty to *register* public laws, upon acts of the sovereign itself, they transcended the judicial province.[46]

In view of the foregoing, it is readily conceivable that when Chief Justice Marshall undertook, in *Marbury v. Madison*, to

44. Public Records of Connecticut, Vol. 1, page 387.

45. Constitution of 1776, Sect. 17.

46. Luchaire, *Les Communes Françaises*, page 111, *seq.* and *Histoire des Institutions Monarchiques de la France*, Vol. 1, ch. 3, "*organization de la Cour du Roi*; de Tocqueville, *L' Ancien Régime et la Révolution*, 109; Aubert, *Histoire du Parlement de Paris*, cites many interesting charter cases.

show the *reasons* justifying the court in repelling jurisdiction attempted to be conferred upon it by an act of Congress deemed by the judges at variance with the national constitution, he should have been content with a comparatively brief summary of leading positions, declaring, at the same time, the essential universality of the doctrines announced, and that it was merely necessary "to *recognize* certain principles long and well established" to correctly apprehend the nature of the decision which must be made. Nor need we greatly marvel that these principles are not properly applicable to any European polity since with them there is no inheritance of a *limited* constitutional model, and the judiciary must merely enforce, and cannot disregard, *sovereign* commands. Should it attempt to exceed this field of duty, its action, like that of the *Parlement de Paris*, becomes political and must expose those who are guilty of so wide a departure from their proper sphere to the same fate which overtook the picturesque French tribunal.

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